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United States Circuit Court  
of Appeals

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For the Ninth Circuit

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October Term, 1904

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EDWARD CARDWELL,

*Appellant*

*vs.*

THE UNITED STATES OF AMERICA,

*Appellee*

FILED

SEP. 21 1904

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Appellant's Brief

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Upon Appeal from the United States District Court for the  
District of Montana

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MASSENA BULLARD,  
Of Counsel for the Appellant



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OCTOBER TERM 1904

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**No. 1092**

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EDWARD CARDWELL,

Appellant.

vs.

THE UNITED STATES

OF AMERICA,

Appellee.

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APPELLANT'S BRIEF

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STATEMENT OF THE CASE

This is an action in equity instituted by the United States against Edward Cardwell under the provisions of an act of Congress entitled "An act to prevent unlawful occupancy of the public lands," the same being Chapter 149, page 477 of Supplement to the Revised Statutes of the United States, vol. 1, Second Edition. The bill of complaint alleges the filing of an affidavit with the United States District Attorney, provided for in the second section of said act of Congress; the ownership by the United States of the lands described in the complaint, that the lands are public lands; that the appellant, Edward Cardwell, has violated said act of Congress by unlawfully enclosing and fencing the said lands, and "maintaining said unlawful enclosure and over said lands occupying and asserting exclusive right and control thereof, disallowing all other per-

sons and all other stock, except his own or by his permission, to come upon or pass over said lands;" that the appellant, Edward Cardwell "by force, threats, intimidations, and by fencing and enclosing and by other unlawful means, did prevent and obstruct and did combine and confederate with others, to prevent and obstruct any and all persons from peaceably entering upon and establishing a settlement and residence on said described lands or any part thereof; and ever since has and now does by force, threats, intimidations, fencing, and enclosing, and by other unlawful means, prevent, obstruct, combine, and confederate with others to prevent and obstruct any and all persons from peaceably entering upon and establishing a settlement and residence upon said lands, or any part thereof"; that at all the times stated in the bill of complaint the appellant has prevented and obstructed, and ever since has and now does prevent and obstruct, free passage and transit over and through said lands or any part of the same by fences and other unlawful means. The complainant prays for judgment and decree of this Honorable Court against the appellant declaring the fencing and inclosing and all other acts, doings and things heretofore complained of to be unlawful, and directing and ordering the said appellant to take down and remove the same immediately, and in case of appellant's failure to remove the enclosure that the U. S. Marshall shall remove the same, and complainant also prays for an injunction perpetually enjoining and restraining the appellant from a continuance or repetition of the alleged wrongful acts of appellant.

Appellant appeared and answered to the bill, admitting the facts alleged in the bill of complaint as to the filing of the affidavit; the ownership by the United States of the lands described in the bill; that the lands are public lands; that the appellant is without ownership or claim or color of title in or to said lands, but denies that said lands or any thereof are or

at any time have been inclosed with any fence erected or maintained by him; and denies that the lands or any thereof are in his possession or exclusive use or occupation; and denies that he ever erected or maintained or now maintains any fence upon any of the said described lands, and denies that this appellant has any use or occupation whatever of said lands or any thereof, save and except to the extent that certain stock, cattle and animals belonging to him roam over and graze upon said lands or portions thereof as by law they may rightfully do, said lands being a part of the public domain, and there being no barrier or obstruction to prevent the said stock, cattle and animals from roaming over and grazing upon the said lands in common with stock, cattle and animals belonging to persons other than the appellant; and denies that the appellant has or does assert or exercise exclusive right or control over the lands or any thereof or that he has disallowed or disallows other persons or stock to go upon or pass over the lands; and denies that he has combined or does combine with others to prevent or obstruct or does in any way prevent or obstruct all or any persons or person from peaceably entering upon and establishing a settlement and residence on said described lands or any part thereof; and denies that "he has any fence or obstruction upon said lands or any part thereof," and denies all and all manner of unlawful combination or confederacy, wherewith he is by the bill of complaint charged. The complainant filed the usual replication.

Upon the testimony produced the Court entered judgment and decree in favor of the complainant and against the appellant, finding that at the time of the commencement of the suit the appellant "was maintaining and controlling, and has since that time maintained and controlled, a strong and substantial fence upon" the lands described in the bill and that he was without right in so doing. The decree required the appellant to take down and remove all of the fences surrounding

the lands, enjoined him from further interference with the lands and ordered that in case of failure or refusal of the appellant to remove the fences that the same should be removed by the United States Marshal.

From this judgment and decree the appellant has prosecuted this appeal.

The questions raised by the record are the following:

First. Are or were the lands or any part thereof enclosed by the appellant?

Second. Are or were the lands or any part thereof unlawfully enclosed by the appellant?

Third. Can the appellant be compelled to remove his fence unless all parties who join fences with him are joined with him in the action and by the same decree required to remove their fences?

#### SPECIFICATION OF ERRORS

The appellant hereby assigns the following as errors committed by the Court below in the determination of this cause, and the rendition of the decree herein:

##### I.

The Court erred in holding and deciding that the lands or any of the lands described in the bill of complaint were or are inclosed by a fence owned or controlled by the appellant.

##### II.

The Court erred in its decision in holding and deciding that the lands prescribed in the bill of complaint were inclosed with any fence for the reason that the evidence shows that the said lands were not entirely inclosed with any fence either of the appellant or any one else in connection with the fence of the appellant.

##### III.

The Court erred in holding and deciding "that the said Edward Cardwell was at the time of the commencement of this suit maintaining and controlling and has since that time main-

tained and controlled, a strong and substantial fence upon" the lands described in the bill of complaint.

#### BRIEF OF ARGUMENT.

The first question presented for consideration is:

Are or were the lands or any part thereof enclosed by the appellant?

The decree finds that the fence is maintained and controlled upon the land, (record p. 17) and requires the appellant to remove all of the fences surrounding said lands.

The evidence fails to show that appellant has any fence on any part of the land described in bill of complaint. It also fails to show that the lands are surrounded by appellant's fence and also fails to show that appellant's fence encloses the lands.

From the testimony of witness Tilden it appears that part of the fence on the north side of the tract was built and is owned by Alf Thomas, a part by Cab Thomas, and part by John T. Murphy (pp. 30, 31 and 32). Witness Murray does not know that appellant "has inclosed any Government lands by a fence entirely owned by himself." (p. 46). Witness Nelson testifies as to the fence which he says surrounds this land that appellant owns part of it, Cab Thomas owns some of it, Witt owns some of it and John Rosean owns some of it. (p. 65), and that if Cab Thomas and Alf Thomas would take their fences down, appellant wouldn't have the land enclosed and that in his judgment appellant owns only about two thirds of the fence (p. 65 and 66). Witness Wimsett testifies that others have built fences to enclose land which forms part of the enclosure of what he calls Cardwell's field and that without these other fences the field would not be entirely inclosed (p. 76). Witness Jaques admits that a part of the fence belongs to persons other than appellant (p. 90). Witness Bland referring to defendant's exhibit A (p. 181) shows that a large part of the fence is owned by persons other than appellant (p. 104 and 105 and 109). He also testifies that there

was no fence on the west side of sections 6, 7, 18 and 19 T. 1 S. R. 20 E. or on the north side of sections 5 and 6 in said Township or on the north side of section 6 T. 1 S. R. 21 E. (p. 139). Edward Cardwell, the appellant, testifies that large portions of the fences were built and are owned by persons other than appellant (pp. 145, 146) and that the lands were not entirely enclosed (pp. 157, 148 and 149).

The testimony fails to establish the fact that the lands are enclosed by appellant but on the contrary shows that they are not so enclosed.

The second question is as follows:

Are or were the lands or any part thereof unlawfully enclosed by the appellant? We have sought to show in the preceding paragraph that the lands are not enclosed by the appellant, and in fact that they are not enclosed at all. If either of these contentions is true the second question must be answered in the negative. But the most that can be claimed by appellee is that the fences of appellant together with the fences of other parties enclose the lands. If this be conceded it still follows that the allegations of the bill of complaint as to unlawful enclosure by appellant are not sustained. No collusion, combination or confederation is shown.

Can appellant be compelled to remove his fences unless all parties who join fences with him are joined with him in the action and by the same decree required to remove their fences?

The proof shows conclusively that without the fences of other persons than the appellant the lands are not enclosed. This being true it would seem to follow that all parties contributing to the maintenance of the fence should be joined as defendants.

Respectfully submitted,

MASSENA BULLARD,

*Of Counsel for Appellant.*